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Abstract

Since its inception in **1871,** and characterization in the Supreme Court case of *Monroe v. Pape,* 42 **U.S.C.** §**1983** has caused turmoil among commentators concerned with this statute's application in the area of constitutional rights.

KEYWORDS: section 1983, dormant, clause

The Search for a Section 1983 Right Under the Dormant Commerce Clause

Since its inception in 1871, and characterization in the Supreme Court case of *Monroe v. Pape*, 42 U.S.C. § 1983 has caused turmoil among commentators concerned with this statute's application in the area of constitutional rights.[1] The focus of this comment is to describe

1. As stated by the Supreme Court in Monroe v. Pape, 365 U.S. 167, 171 (1961), section 1983 is derived from the Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1873) [hereinafter 42 U.S.C. § 1983]. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

The commentators concerned with section 1983 focus primarily on its protection of "any rights" secured by the Constitution and laws of the federal government. *See, e.g.*, Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 YALE L.J. 1827 (1988) [hereinafter Note, *Section 1983 Remedies*]; Note, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right To Be Free of Protectionist State Action*, 86 MICH. L. REV. 157 (1987) [hereinafter Note, *Dormant Commerce Clause Claims*]; Spurrier, *Federal Constitutional Rights: Priceless or Worthless? Awards of Money Damages Under Section 1983*, 20 TULSA L.J. 1 (1984); Comment, *The Commerce Clause: Allocating Provision or Individual Right? Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984), cert. denied, 105 S.Ct. 126 (1984).*, 7 U. ARK. LITTLE ROCK L.J. 757 (1984) [hereinafter Comment, *The Commerce Clause*].

Other commentators have noted the problem section 1983 created by opening the proverbial "floodgates of litigation." *See, e.g.*, Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 742 n.8 (1987) (quoting Justice Rehnquist's complaint in Smith v. Wade, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting), about the " 'staggering effect of [section] 1983 claims upon the workload of the federal courts . . .' "); Note, *Is the Section 1983 Civil Rights Statute Overworked? Expanded Use of Magistrates—An Alternative to Exhaustion*, 17 .U. MICH. J.L. REF. 361 (1984) (generally discussing the problems with overuse of 42 U.S.C. § 1983). *But see* Note, *Section 1983 Remedies*, *supra*, at 1845-46.

the nature of the constitutional rights which are covered by section 1983 for the purpose of awarding attorney's fees under 42 U.S.C. § 1988.[2] The obvious choices are those individual or personal rights which fall within the purview of the Bill of Rights and the Civil War amendments, and these will be addressed in the sections which follow.[3] However, the more controversial issue is whether the Commerce Clause of the Constitution embodies personal rights which are implicated in the statutory language of section 1983 and section 1988 to allow the courts to award attorney's fees to plaintiffs who have been granted relief from burdensome state statutes.[4]

The Supreme Court has denied certiorari several times to cases involving the Commerce Clause issue,[5] but has now granted certiorari

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2. Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1980). Courts have also stated that a party who prevails on a ground other than section 1983 is entitled to attorney's fees under section 1988 if section 1983 would have been an appropriate basis of relief. *See* J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1473 (10th Cir. 1985). Thus, it is not mandatory that a section 1983 claim of relief be brought in the plaintiff's original complaint in order to get attorney's fees later.

3. These rights were expressly considered by the Forty-second Congress in the debates prior to passage of the then Ku Klux Klan Act of 1871 because the act was passed in the wake of the fourteenth amendment. *See* Monroe v. Pape, 365 U.S. 167, 180 (1960).

4. This comment is concerned with state regulation under the dormant commerce clause doctrine where a state may regulate or infringe upon, within certain limits, interstate commerce when Congress has not legislated pursuant to its Commerce Clause power. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). This situation is to be distinguished from that where the state passes statutes in conflict with extant congressional statutes enacted under the Commerce Clause and which, therefore, causes the Supremacy Clause to be invoked to defeat the conflicting state regulation of interstate commerce. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 8.1 (3d ed. 1986); Note, *Dormant Commerce Clause Claims*, *supra* note 1, at 158 n.11.

5. *See, e.g.*, Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); Private Truck Council, Inc. v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986). Justices White, Brennan, and O'Connor dissented from the denial of certiorari in *Private Truck Council*. 476 U.S. at 1129. The dissenting Justices recognized a conflict of authority between the Eighth Circuit in *Consolidated Freightways Corp.*, 730 F.2d 1139, and the Third Circuit in

to *Dennis v. State*, in which the Nebraska Supreme Court denied plaintiff's motion for attorney's fees under 42 U.S.C. § 1988.[6] In *Dennis*, the Nebraska court based its reasoning on that of several federal courts which have also determined that the Commerce Clause does not confer individual rights within the meaning of section 1983 which would allow an award of fees under section 1988.[7] However, the courts that have considered the Commerce Clause issue failed to define what a right was before considering whether a right existed under the Commerce Clause.[8]

The goal of this comment is to derive the meaning of rights, and then to see if these rights are included as part of the Commerce Clause structure. Section one discusses the reasoning of the Nebraska Supreme Court's decision in *Dennis* in order to gain some bearing on this analysis. Section two's analysis results in a definition of "rights" which fits into the scheme of 42 U.S.C. § 1983. This definition is derived from a consideration of the plain meaning and the legislative history of section 1983, as well as from the history of the Commerce Clause, and the Supreme Court's jurisprudence in this area. Section three considers the nature of the Commerce Clause as a mechanism which allocates power between the state and federal governments. This section shows that the Commerce Clause serves only to provide "benefits" for individuals that are not encompassed by section 1983's meaning of "rights." Section

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Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), and would have granted certiorari on this basis. *Private Truck Council*, 476 U.S. at 1129. This opinion shows that there are members of the Court who recognize that an issue exists concerning whether the Commerce Clause secures individual rights within the meaning of 42 U.S.C. § 1983.

6. Dennis v. State, 234 Neb. 427, 451 N.W.2d 676, *cert. granted sub nom.* Dennis v. Higgins, 110 S. Ct. 2559 (1990). The question that the Court granted certiorari based upon was, "[i]s the claim that state tax discriminates against interstate commerce in violation of Commerce Clause and that seeks injunction against enforcement of tax cognizable under 42 USC § 1983?" 58 U.S.L.W. 3749 (U.S. May 29, 1990) (No. 89-1555). It was not Kansas' statutory scheme which was at issue, as stated in 58 U.S.L.W. 3749, but rather Nebraska's taxation of out-of-state motor carriers.

7. *See, e.g., Consolidated Freightways Corp.*, 730 F.2d 1139; *Private Truck Council*, 503 A.2d 214. These and other cases denying the existence of Commerce Clause rights to plaintiffs seeking attorney's fees based on section 1983 and section 1988 will be considered in more detail in section four of this comment.

8. *See* Note, *Section 1983 Remedies*, *supra* note 1; Note, *Dormant Commerce Clause Claims*, *supra* note 1. Several commentators also fail to define what a right is before questioning whether one exists under the Commerce Clause. *See* Note, *Dormant Commerce Clause Claims*, *supra* note 1; Comment, *The Commerce Clause*, *supra* note 1.

four uses these considerations to examine the Nebraska Supreme Court's decision in *Dennis* and concludes that it was correct in holding that the Commerce Clause is not a source of rights cognizable under 42 U.S.C. § 1983, and therefore, that section 1988 attorney's fees were precluded.

I. The Decision In *Dennis v. State*

Dennis v. State is a typical case involving yet another state's attempt to tax out-of-state people for use of the state's highways.[9] However, the case is one of the relatively few involving a plaintiff attempting to secure a claim of relief under 42 U.S.C. § 1983 for an impingement of a Commerce Clause "right" in order to get attorney's fees under section 1988.[10] In *Dennis*, the plaintiff, Mark E. Dennis, claimed that Nebraska had exacted taxes pursuant to two statutes[11]

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9. *See, e.g.*, State v. Private Truck Council, 258 Ga. 531, 371 S.E.2d 378 (1988); Private Truck Council v. State, 128 N.H. 466, 517 A.2d 1150 (1986).

10. *See Consolidated Freightways Corp.*, 730 F.2d 1139; *Private Truck Council*, 258 Ga. 531, 371 S.E.2d 378; *Private Truck Council*, 128 N.H. 466, 517 A.2d 1150; *Private Truck Council*, 503 A.2d 214.

11. The first statute read:

> *Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska*, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks . . . and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks . . . owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, *in which such trucks . . . are domiciled*, grant reciprocity comparable to that extended by the laws of Nebraska.

Dennis, 234 Neb. at 443, 451 N.W.2d at 685-86 (emphasis in original) (quoting NEB. REV. STAT. § 60-305.02 (1984)). The second statute provided:

> (1) In case a foreign state . . . is not reciprocal as to license fees on commercial trucks . . . the owners of such *nonresident vehicles* from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks . . . other than license fees, and the reciprocity law of any other foreign state . . . does not act to exempt Nebraska trucks . . . operating in that state from payment of all fees whatsoever, the owners of such *foreign trucks* . . . shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks . . . .
>
> (7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) *the jurisdiction in which a commercial vehi-*

which violated the Commerce Clause[12] and the Privileges and Immunities Clause[13] of the United States Constitution, and which also gave rise to a claim of relief under 42 U.S.C. § 1983 by depriving him of constitutional rights.[14]

The plaintiff in *Dennis* owned and operated a trucking company with its principal place of business in Ohio.[15] As part of this business, plaintiff owned one tractor and two trailers, all registered in Ohio.[16] Due to the Ohio registration, plaintiff was subject to a one to two cent tax per mile while driving in Nebraska, because Ohio exacted the same tax of Nebraska-registered vehicles operating in Ohio.[17]

The trial court held that the statutes constituted an undue burden on interstate commerce in violation of the Commerce Clause and enjoined their enforcement.[18] However, the trial court dismissed the counts under the Privileges and Immunities Clause and 42 U.S.C. § 1983 for failure to allege facts sufficient to support the action.[19] Rather than award attorney's fees pursuant to 42 U.S.C. § 1988, the trial

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cle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated, or otherwise controlled, and the vehicle is assigned to such principal place of business . . . .

Dennis, 234 Neb. at 443-44, 451 N.W.2d at 686 (emphasis in original) (quoting NEB. REV. STAT. § 60-305.03(1), (7) (1984)). Both statutes were amended after the trial court's decision, thus making the Commerce Clause issue moot in respect to Nebraska. *Dennis*, 234 Neb. at 429, 451 N.W.2d at 678 (referencing NEB. REV. STAT. §§ 60-305.02 to .03 (1988)).

12. "The Congress shall have the Power [t]o . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 2.

13. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

14. *Dennis*, 234 Neb. at 428, 451 N.W.2d at 677-78. The plaintiff also sought to enjoin enforcement of the statutes "as a grant by the Legislature of special and exclusive privileges, immunities, and franchises in violation of [the Nebraska Constitution] . . . ." *Id.* at 428, 451 N.W.2d at 677. The trial court ruled that plaintiff failed to prove this violation and dismissed the action. *Id.* at 428-29, 451 N.W.2d at 678. Though the Nebraska Supreme Court noted that this was an issue below, it made no further mention of the action in its opinion.

15. *Id.* at 442, 451 N.W.2d at 685.

16. *Id.*

17. *Id.*

18. *Id.* at 428, 451 N.W.2d at 678.

19. *Id.* at 428-29, 451 N.W.2d at 678.

court stated that the "plaintiff and his attorneys are entitled under the [e]quitable [f]und [d]octrine to payment of their expenses and reasonable fees."[20] Based on the trial court's opinion, the pertinent issue raised on appeal to the Nebraska Supreme Court was whether the statutes' impermissible burden on interstate commerce created a claim cognizable under section 1983 so as to allow attorney's fees under section 1988.[21]

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20. The equitable fund doctrine provides that,

> when one by active litigation creates, or increases a fund in which others are entitled to share, those others should bear a portion of the litigation expenses, and that they can be made to do so by charging the fund with the reasonable expenses of the litigant who preserves or augments it.

D. DOBBS, REMEDIES § 3.8, at 200 (1973). The plaintiff claimed that the fund consisted of the total amount of taxes collected by Nebraska that would be subject to refund. *Dennis*, 234 Neb. at 429, 451 N.W.2d at 678. The trial court did not agree with this contention and left to another day the determination of what fund, if any, was available for payment of the fees. *Id.*

21. This is the same issue upon which the United States Supreme Court granted certiorari. Dennis v. Higgins, 58 U.S.L.W. 3749 (U.S. May 29, 1990) (No. 89-1555). Two other issues were raised to the Nebraska Supreme Court: first, whether enforcement of the statutes violated the Privileges and Immunities Clause, and also, whether the trial court erred in awarding fees under the equitable fund doctrine. *Dennis*, 234 Neb. at 429, 451 N.W.2d at 678. On the first issue, the Nebraska Supreme Court held that the Privileges and Immunities Clause was not violated by the taxation of the out-of-state trucks. *Id.* at 445, 451 N.W.2d at 686. The court first noted that the Supreme Court decision in Toomer v. Witsell, 334 U.S. 385, 398 (1948), precluded only " 'classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.' " *Dennis*, 234 Neb. at 443, 451 N.W.2d at 685. The Nebraska Supreme Court then observed that Nebraska's statutory scheme did not impose taxation based on the "resident or nonresident status of the motor carrier, but [was] based upon the state where the particular vehicle [was] registered." *Id.* at 444, 451 N.W.2d at 686. Under this statute then, even residents of Nebraska would be taxed if they drove vehicles which were covered by the statute and registered in a state other than Nebraska. *Id.* The court concluded that since plaintiff was taxed simply because his tractor was registered in Ohio, and because Nebraska residents would also be taxed under the same circumstances, the statute was not one which discriminated against out-of-state citizens in violation of the Privileges and Immunities Clause. *Id.* at 444-45, 451 N.W.2d at 686.

In an alternative holding on the Privileges and Immunities Clause issue, the court first reasoned that only out-of-state citizens had standing to challenge violations of the Privileges and Immunities Clause. *Id.* at 445, 451 N.W.2d at 686. *See also* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). The court concluded that because plaintiff did not even allege that he was a citizen of another state in his complaint, he did not have standing to bring the Privileges and Immunities Clause challenge against the statutes. *Dennis*, 234 Neb. at 445, 451 N.W.2d at 686.

The Nebraska Supreme Court held that the Commerce Clause did not secure rights cognizable under section 1983 which would allow an attorney's fee award under section 1988.[22] Therefore, the court affirmed the trial court's dismissal of this claim.[23] In its decision, the court first noted that there was a conflict of authority on the Commerce Clause issue and decided, after considering the main cases in the area, that the "better reasoned cases hold that there is no cause of action under section 1983 for violations of the [C]ommerce [C]lause."[24] The court relied primarily on the Eighth Circuit decision in *Consolidated Freightways Corp. v. Kassel*,[25] and other cases which make reference to it,[26] for the proposition that the Commerce Clause is a constitutional

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The next issue was raised by the defendant, the State of Nebraska, and questioned whether the trial court erred in allowing plaintiff his fees and costs pursuant to the equitable fund doctrine. The court stated that the doctrine "presupposes the existence of a fund . . . and requires the prevailing party to have brought suit to preserve or protect [the] fund . . . ." *Id.* at 445, 451 N.W.2d at 687. Moreover, the fund must be an "immediate fund" which the court must have control over from the beginning of the trial, and from which the court can award attorney's fees and costs at trial. *Id.* at 446, 451 N.W.2d at 687. In *Dennis* however, the court stated that "[t]here is no fund in this case, much less a fund within the jurisdiction of the trial court." *Id.* On this note, the court held that it was error for the trial court to award fees based on the equitable fund doctrine. *Id.* at 445, 451 N.W.2d at 688. The court also noted that Nebraska "has not waived its sovereign immunity as to attorney fees under the circumstances such as this case." *Id.* at 448, 451 N.W.2d at 688. Thus, in a second alternative holding, the court reversed the trial court's decision to award fees under the doctrine.

Finally, the Commerce Clause violation was not appealed by Nebraska because the state revised the two tax statutes that were in issue. *See supra* note 11.

22. *Dennis*, 234 Neb. at 430, 451 N.W.2d at 678.

23. *Id.* at 448, 451 N.W.2d at 688.

24. *Id.* at 430, 451 N.W.2d at 678.

25. 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

26. *Dennis*, 234 Neb. at 430-32, 451 N.W.2d at 678-80 (citing *Consolidated Freightways Corp.*, 730 F.2d 1139). The *Dennis* court also relied on several federal and state cases which had cited *Consolidated Freightways Corp.* in support of their decisions. *See* Kraft v. Jacka, 872 F.2d 862 (9th Cir. 1989); J & J Anderson v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Pesticide Pub. Policy Found. v. Village of Wauconda, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd*, 826 F.2d 1068 (7th Cir. 1987); State v. Private Truck Council, Inc., 258 Ga. 531, 371 S.E.2d 378 (1988); Private Truck Council, Inc. v. State, 221 N.J. Super. 89, 534 A.2d 13 (1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); Private Truck Council, Inc. v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); Private Truck Council, Inc. v. State, 128 N.H. 466, 517 A.2d 1150 (1986). In all of these cases, the court distinguished sections of the Constitution which confer individual rights from those which serve only to allocate power between the levels of government. These cases, and their distinction, will be considered in more detail in section four of this comment. Note at this point,

provision which allocates power between the state and the federal governments. Further, the court recognized, in reliance upon the *Consolidated Freightways Corp.* decision, that the most individuals can expect of the dormant commerce clause limit on the states is an indirect benefit from its enforcement, a benefit which is "not the same thing as a 'right' secured by the Constitution within the meaning of section 1983."[27]

The Nebraska Supreme Court rejected other cases which stated that individuals had a right to engage in interstate commerce. For instance, the court adopted the reasoning of *Consolidated Freightways Corp.*, which discredited " 'two earlier federal cases stating terse holdings going the other way . . . neither of [which] . . . analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce Clause issue.' "[28] The court also dismissed several United States Supreme Court references to a right to engage in interstate commerce based on the Eighth Circuit's dismissal of the same in *Consolidated Freightways Corp.*.[29] Thus concluding that the Commerce Clause did not secure

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however, that these cases all beg the question of what a right is. Rather than define the term, the authorities rely on the happenstance of the Forty-second Congress' limited use of the term "rights" well over 100 years ago, as well as the Supreme Court's usage in contexts unrelated to the present question of Commerce Clause rights. Beginning in section two, this comment draws on these sources in arriving at a general definition of rights which can be applied to a modern question never considered in the past debates and cases.

27. *Dennis*, 234 Neb. at 432, 451 N.W.2d at 680.

28. *Id.* at 438-39, 451 N.W.2d at 683. The two cases cited in this reference are Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), and Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1975), *aff'd on other grounds*, 425 U.S. 463 (1976). These are discussed in section four of this comment.

29. *Dennis*, 234 Neb. at 432, 451 N.W.2d at 679-80. These cases were: Garrity v. New Jersey, 385 U.S. 493 (1967); Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910); and Crutcher v. Kentucky, 141 U.S. 47 (1891). The *Garrity* reference to a right to engage in interstate commerce was considered "mere dictum." *Dennis*, 234 Neb. at 432, 451 N.W.2d at 679. The references in *Western Union* and *Crutcher* were viewed by the Nebraska Supreme Court as focusing on the separation of powers between the federal and state legislatures which, therefore, excluded the Commerce Clause as a right securing provision. These cases are further considered in note 148, along with three other cases that were not mentioned in *Dennis*, but which do refer to a "right" to engage in interstate commerce: namely, Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911), Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

section 1983 rights, the Nebraska Supreme Court affirmed the trial court's dismissal of the action. The following sections of this comment consider the underlying forces of the rights/benefits distinction, which is made by the Nebraska court in *Dennis*, to support the conclusion that the Commerce Clause does not afford rights to individuals which can be vindicated by a section 1983 action.

II. The Definition of a Section 1983 Right

The failing in cases like *Dennis* is that the courts do not define section 1983 rights before considering the Commerce Clause issue, and whether the plaintiff can get attorney's fees under section 1988. The problem the courts face in this respect is that 42 U.S.C. § 1983 uses the term "rights" without providing a definition which would aid in determining what these rights are, and whether such rights exist under the Commerce Clause. In order to discover the meaning of "rights" then, the courts must resort to statutory interpretation tools. Of importance here is the plain meaning rule which provides that "where the [statutory] language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."[30] However, where the statute's language is vague or ambiguous, the courts will then look to the legislative history of the statute to surmise congressional intent on how the ambiguous term should be applied.[31] The first inquiry, then, looks to the language of 42 U.S.C. § 1983 to determine the scope and meaning of the term "rights."

A. The Plain Meaning of Section 1983

Under the plain meaning doctrine, two questions exist with respect to 42 U.S.C. § 1983. The first of these considers the scope of "rights," as the word is used in section 1983, because "rights" is modified by the term "any" in the statute. The second question asks what is a "right"

30. Caminetti v. United States, 242 U.S. 470, 485 (1917) (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)). The import of the Court's statement is that the Court will first look to determine if terms used in the statute are vague or ambiguous. If the terms are neither vague nor ambiguous, the Court will then base its decision on the plain meaning of the statute.

31. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 285 (1990).

within the meaning of section 1983.

Section 1983 uses the words "any rights . . . secured by the Constitution and laws . . . ."[32] Use of the term "any," without other words to modify it, would seem to suggest that any right which exists under the Constitution and federal statutes would be within the ambit of section 1983. However, early Supreme Court cases declined to give such a broad reading to this statute.[33] For instance, the Court in *Holt v. Indiana Manufacturing Co.*[34] refused to extend section 1983 coverage beyond "civil rights," while in *Hague v. Committee for Industrial Organization*[35] it drew a tenuous distinction between "personal" and "property" rights, the former included as section 1983 rights while the latter was not. These cases restricting the scope of section 1983 have since been overruled by the modern Supreme Court which is eager to confirm the existence of constitutionally and statutorily created rights in order to meet the broad language of "any rights" used by 42 U.S.C. § 1983.[36] Indeed, as one commentator has noted, "the Supreme Court has never placed a constitutional provision outside section 1983."[37] Several cases support this proposition including *Maine v. Thiboutot*,[38]

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32. *See supra* note 1 for the text of 42 U.S.C. § 1983.

33. *See generally* Note, *Section 1983 Remedies*, *supra* note 1, at 1834-35.

34. 176 U.S. 68, 73 (1900).

35. 307 U.S. 496, 531 (1939). The plurality in *Hague* was actually interpreting the scope of 28 U.S.C. § 1343, the jurisdictional counterpart of 42 U.S.C. § 1983, which gives the district courts original jurisdiction in section 1983 suits. The language used in section 1343 is practically the same as that used in section 1983:

> Civil rights and elective franchise
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1982).

36. *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) (overruling the personal/property rights distinction established by *Hague*, 307 U.S. 496, and limiting the *Holt*, 176 U.S. 68, "civil rights" restriction of section 1983 to its facts). *But see* Carter v. Greenhow, 114 U.S. 317 (1885) (Contracts Clause does not secure rights within the meaning of section 1983); Poirier v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978) (same).

37. Note, *Section 1983 Remedies*, *supra* note 1, at 1835.

38. 448 U.S. 1 (1979) (stating generally, section 1983 encompasses violations of both constitutional and federal statutory rights).

West Virginia State Board of Education v. Barnette,[39] *Lane v. Wilson*,[40] *Brown v. Board of Education*,[41] and *Lynch v. Household Finance Corp.*.[42] Due to the Court's broad interpretation of section 1983, if an individual right exists under the Commerce Clause, this right would likely be included within the meaning of rights protected by section 1983.

Unlike its usefulness in determining the scope of "rights" which section 1983 invokes, the plain meaning doctrine provides no guidance in defining what a right is under section 1983. Indeed, it has been recognized that " 'plain meaning' is too simplistic a guide to the construction of section 1983."[43] This is especially so because the Court has not provided a clear test which could be used to determine what a right is under section 1983.[44] Without a statutory or Court-formulated test for determining what a right is, the plain meaning rule is of no avail because it would leave the Court to answer the question on intuition alone. Where the plain meaning rule provides no guidance in determining how a statute's terms are to be applied or interpreted, the Court should next resort to the legislative history of the statute and other "extra-statutory materials pertaining to what happened before and during the passage of the law to explain language that is ambiguous . . . ."[45] The legislative history of 42 U.S.C. § 1983 is, therefore, invaluable, because the plain meaning rule cannot be usefully applied due to the ambiguous nature of the term "rights."[46] Considering this history, as well as other notions of the meaning of the term "rights" will lead to a definition which can be used in determining if the Commerce Clause embraces individual rights.

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39. 319 U.S. 624 (1943) (rights under the Free Exercise Clause of the first amendment are part of section 1983 rights).

40. 307 U.S. 268 (1939) (incorporating fifteenth amendment voting rights under section 1983).

41. 347 U.S. 483 (1954) (allowing a section 1983 remedy for the violation of equal protection rights under the fourteenth amendment).

42. 405 U.S. 538 (1972) (including property rights as rights cognizable under section 1983).

43. *Thiboutot*, 448 U.S. at 14 (Powell, J., dissenting).

44. D. ROTUNDA, MODERN CONSTITUTIONAL LAW § 6.3, at 363 (3d ed. 1989).

45. Wald, *supra* note 31, at 282.

46. Justice Powell has also stated that section 1983's history should guide the Court's interpretation of this statute. *See* Matasar, *Personal Immunities*, *supra* note 1, at 752 (relying on the Court's opinion in Imbler v. Pachtman, 424 U.S. 409, 421 (1976) for this proposition).

B. The Legislative History of Section 1983

In *Chapman v. Houston Welfare Rights Organization*, Justice Stevens, speaking for a majority of the Court, stated that "in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."[47] The first Supreme Court case to imbue section 1983 with a substantively broad scope based on an examination of the statute's legislative history and purposes was *Monroe v. Pape*.[48] In that case, the Court considered whether 13 police officers, who had broken into the petitioner's home without a search warrant and arrested him without an arrest warrant, had acted under color of state law in order to allow the petitioner's claim of relief under section 1983 against both the officers and the City of Chicago.[49] In deciding that the action against the officers alone was permissible while the action against the City was not, the Court noted that section 1983 was enacted in response to the Ku Klux Klan's activities against the freedmen and other minorities in the South:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . .[50]

As revealed by this statement, the proposed legislation sought to elimi-

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47. 441 U.S. 600, 608 (1979) (considering whether the plaintiff's complaint stated a claim under the Supremacy Clause which was cognizable under 42 U.S.C. § 1983, and which would provide the lower court with subject matter jurisdiction).

48. 365 U.S. 167 (1961). *See also* Spurrier, *supra* note 1, at 3 (citing cases which had, prior to *Monroe*, limited the scope of section 1983 as a remedy for deprivation of rights, privileges, or immunities).

49. *Monroe*, 365 U.S. 167.

50. *Id.* at 172-73 (quoting President Grant's message to Congress reported in CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)). *See also* Spurrier, *supra* note 1, at 2 (stating that section 1983 was "enacted to protect the newly-freed blacks from the lawless activities of whites in southern states . . .").

nate state inactivity concerning Klan operations which resulted in denial of equal protection and due process rights to the recently freed slaves of the South.[51]

The *Monroe* Court went on to point out three purposes of section 1983 in alleviating this denial of fourteenth amendment rights. First, the legislation served as a tool to invalidate any "invidious legislation by States against the rights or privileges of citizens of the United States."[52] Second, the Court stated that section 1983 provided a remedy where state law is inadequate, and quoted Senator Sherman for support of this conclusion:

> [I]t is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.[53]

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51. U.S. CONST. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Since this amendment was ratified in 1868, only three years before President Grant's statement, *supra* at the text accompanying note 50, it is safe to draw the conclusion that the President's use of the language "effectually secure life, liberty, and property" was significantly influenced by the fourteenth amendment's Due Process Clause language that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . .," because the language in his statement and that in the Clause is so similar. Also, the President's use of "enforcement of the laws in all parts of the United States" implicates the fourteenth amendment's equal protection language, "nor deny any person . . . the equal protection of the laws," for the same reason.

52. *Monroe*, 365 U.S. at 173 (quoting Congressman Sloss, CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

53. *Id.* at 173-74 (citing CONG. GLOBE, 42d Cong., 1st Sess. 345 (1871)). This statement provides an example of equal protection denial to blacks at the time. Enforcement of state laws here would have allowed only racist whites to testify as witnesses in trials of black citizens. An almost irrebuttable presumption of guilt thus arose which state law would have no effect in curing. Section 1983 presumably offered a remedy for this denial of equal protection by providing a neutral tribunal which eliminated the racist discrimination between black and white witnesses.

Finally, section 1983 provided "a federal remedy where the state remedy, though adequate in theory, was not available in practice."[54] This is the remedy which would cut to the heart of *de facto* discrimination against blacks in the South.[55] With these purposes derived from the legislative history of section 1983 in mind, the *Monroe* Court ultimately stated that,

> one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the [f]ourteenth [a]mendment might be denied by the state agencies.[56]

With this statement, and the preceding look at the legislative debates, it is easy to surmise, as the Court in *Monroe* did, that the Forty-second Congress used the term "rights" in the context of fourteenth amendment rights due to the frequent references to the terms and policies underlying this amendment.[57]

Based on the intuitive sense of the word, "rights" under the fourteenth amendment means individual rights aimed at the protection of people who are denied due process and equal protection of the laws by state governments. This focus on rights within the context of the fourteenth amendment has been followed by later Supreme Court decisions. For instance, the Court in *Lynch v. Household Finance Corp.* recognized that section 1983 "was passed for the express purpose of 'enforc[ing] the [p]rovisions of the fourteenth amendment.' "[58] The Court went on to state, "the rights that Congress sought to protect in [section

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54. *Monroe*, 365 U.S. at 174.

55. *De facto* discrimination is the situation where the state's statutes are not discriminatory on their face, but are applied, enforced, or not enforced in such a manner which effectively discriminates against blacks, and other minorities. The *Monroe* Court recognized this in its quotation of Senator Burchard. 365 U.S. at 176-77 (citing CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871)). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (considering the differences between *de facto* and *de jure* discrimination).

56. *Monroe*, 365 U.S. at 180.

57. This conclusion is also supported by the title given to section 1983 when it was passed by the Forty-second Congress: "An Act to enforce the Provisions of the Fourteenth Amendment and for other purposes." CONG. GLOBE, 42d Cong., 1st Sess. app. 335 (1871).

58. 405 U.S. at 545.

1983] were described by the chairman of the House Select committee that drafted the legislation as 'the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.' "[59] Later, in *Chapman v. Houston Welfare Rights Organization*, the Court noted that "it is . . . clear that the prime focus of [C]ongress in all of the relevant legislation was ensuring a right of action to enforce the protections of the fourteenth amendment and the federal laws enacted pursuant thereto."[60] If it was doubted before, this language unequivocally shows that Congress used the word "rights" with the intent to protect fourteenth amendment personal or individual rights. These are individual rights because neither the state nor the federal government has the power to infringe upon these rights; this is a concept which irresistibly leads to the definition of section 1983 "rights."[61]

C. The Definition of a Right

The major characteristic which separates a right from other constitutional entitlements is that rights cannot be stripped from the individual by the government, whether it be state or federal.[62] This notion

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59. *Id.* at 545 (quoting Representative Shellabarger, CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871)).

60. 441 U.S. at 611. *See also* Lugar v. Edmonson Oil Co., 457 U.S. 922, 934 (1982) ("The history of [section 1983] is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the [f]ourteenth [a]mendment affords the individual.").

61. The state or federal government may infringe on these rights in those situations where the state is permissibly acting pursuant to its police power, or where the federal government is acting according to its constitutional prerogatives. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-1 to 16-59 (2d ed. 1988). However, in either of these instances, the governing entity must still pass the Court formulated strict scrutiny test for statutes and other regulations which infringe on the due process and equal protection rights of the individual. The reasoning behind such a stringent test is that neither the states nor the federal government are empowered to regulate these rights under the Constitution. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 4, § 11.4, at 357, § 11.7, at 367. This reasoning will be elaborated upon in the following sections of this comment.

62. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 195-205 (1980). Prior articles attempt to establish the existence of Commerce Clause "rights" by relying on precedential use of the term by the Supreme Court. *See, e.g.*, Note, *Dormant Commerce Clause Claims*, *supra* note 1. The point of the following historical discussion in the text is to avoid any misapplication of these usages, which were derived from specific sets of facts before the Court, by establishing a com-

of individual rights, if it must be attributed to some point of origin in United States history, evolved from the "natural law" concept which flourished in the 18th and 19th centuries.[63] During this time, all branches of the federal and state governments were considered to have a limited "sphere of authority defined by the nature and function of that level or branch and by the *inherent rights of citizens*."[64] These "inherent rights" included the rights to personal security and liberty, and the right to keep private property. They were rights that in no way could be limited by the government, simply because its authority and jurisdiction did not include such a power.[65] The natural law concept was a guide to the Court even after ratification of the fourteenth amendment in 1868, when it would seem that the Court would no longer need the concept.[66]

As discussed above, the fourteenth amendment was passed with the intent to provide federal authorities with the means to protect due process and equal protection rights of people who were plagued in the South by the Ku Klux Klan. These are the same rights which the Supreme Court previously included in the natural law category. However, the Court construed the fourteenth amendment's protection quite narrowly when presented with the *Slaughter-House Cases*.[67] The reason for this restricted reading was the Court's fear that the fourteenth amendment's scope would expand so much that the Court would find itself adjudicating cases which were properly within the states' jurisdiction.[68] However, the amalgamation of the natural law concept and the

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mon definition of rights that can be applied to the Commerce Clause analysis.

63. L. TRIBE, *supra* note 61, § 8-1, at 560, § 15-3, at 1309-10.

64. *Id.* at 560 (emphasis added).

65. *Id.*

66. *Id.* at 565.

67. *Id.* at 562. The *Slaughter-House Cases* (Butchers' Benevolent Association v. Crescent City Live-Stock Landing and Slaughter-House Co.) decision was that the Privileges and Immunities Clause of the fourteenth amendment guaranteed only those rights of national citizenship including, as the Court stated in dicta, the right,

> to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.

83 U.S. (16 Wall.) 36, 79 (1872) (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867)).

68. L. TRIBE, *supra* note 61, § 8-1, at 565. Recall that this was a period in his-

language of the fourteenth amendment would alleviate this fear and allow the Court to embark upon its now infamous journey into the *Lochner* era.[69] The crux of the line of cases during this period was the Court's move toward review of government regulations with an eye to substantive economic due process based on the fourteenth amendment and natural law concepts.

The Court used the well established limits of natural law to limit the reach of the fourteenth amendment, and thus protect the states' existing field of sovereign rights. As Professor Tribe states, "[j]ust as inherent limitations on government guided natural law scrutiny of legislative action, so could they guide federal judicial review under the fourteenth amendment."[70] The important development of this time was the individual right to freedom of contract which arose from the natural law aspect of the Court's review under the fourteenth amendment.[71] The freedom of contract theory's evolution began with *Allgeyer v. Louisiana*,[72] continued with *Lochner v. New York*,[73] and ended with *West Coast Hotel v. Parrish*.[74] For purposes of this comment, it is sufficient to note that freedom of contract was an individual right derived from the now discredited field of substantive economic due process review. However, the natural law concept underlying the Court's review in this area is useful in forming a definition of the rights implicated by 42 U.S.C. § 1983.[75]

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tory when the Court was much less willing to grant power to the federal government at the cost of diminishing the states' sovereign rights.

69. *Id.* at 565-66.

70. *Id.* at 565.

71. Specifically, freedom of contract arose from the natural law concept of the individual's right to personal liberty. Professor Tribe states that the Court in Barbier v. Connolly, 113 U.S. 27, 31 (1885), "warned that the [D]ue [P]rocess [C]lause protected the freedom to contract and prevented arbitrary deprivations of common-law liberty—deprivations which *by definition* could not amount to exercises of the police power, whose mission was the *protection* of common-law rights." L. TRIBE, *supra* note 61, § 8-1, at 566 (emphasis in original). Freedom of contract was derived of the natural law because the government could not interfere with the individual's exercise of this right. Interference with this right was not part of the nature and function of the government entity. Thus, freedom of contract was seen as a limit on the scope of the individual rights created by the fourteenth amendment, because the Court was already well versed in the limits of the individual's right to personal liberty.

72. 165 U.S. 578 (1897).

73. 198 U.S. 45 (1905).

74. 300 U.S. 379 (1937). *See also* L. TRIBE, *supra* note 61, § 8-2, at 567.

75. As the Court in Moore v. City of East Cleveland stated:

Substantive due process has at times been a treacherous field for this

Merging the plain meaning and legislative history of section 1983 with the theory underlying the natural law notion results in a definition of "rights." The plain meaning reveals only that any rights which may exist under the Constitution and federal laws will be included in section 1983's coverage.[76] The legislative history of section 1983 reveals that the Forty-second Congress intended the statute to reach those deprivations of due process and equal protection rights which the people of the South suffered during the reconstruction period after the Civil War.[77] What makes these fourteenth amendment guarantees "rights" lies in the natural law concept which was commonly accepted when both section 1983 and the fourteenth amendment were created. As Professor Tribe states, natural law considered that governing entities were limited by both the "nature and function" of the entity and by the "inherent rights" of the citizens governed by the entity.[78] Stated another way, the government was powerless to infringe upon the inherent rights of the people, due to the concept of natural law, because it was not part of the nature and function of this entity to do so. It follows then that the rights held by people under the fourteenth amendment, the rights which were in the express contemplation of Congress while enacting section 1983, are immune from government interference because the purpose of this amendment was to take away the states' power to rampantly continue their interference.[79]

The definition of "rights" can now be placed on this framework of section 1983's plain meaning and legislative history, and the natural

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> Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court [footnote omitted]. That history counsels caution and restraint. But it does not counsel abandonment . . . .

431 U.S. 494, 502 (1977). Implicit in this language is the fact that the Court will continue to draw on concepts of the past, such as natural law concepts, in order to define certain rights which may be implicated in the future.

76. *See supra* part A of this section.

77. *Id.*

78. *See* L. TRIBE, *supra* note 61, § 8-1, at 560, § 15-3, at 1309-10.

79. *See* Katzenbach v. Morgan, 384 U.S. 641, 651-52 n.10 (1966). This construction of fourteenth amendment rights is as applicable today as it was at the turn of the century. Though fourteenth amendment rights are not impervious to government burdens, the governing body must demonstrate some compelling interest for the burden; otherwise, the encroachment is constitutionally invalid. *See supra* note 61.

law. *Rights are all things which inure to the person upon which that person can claim to be free of governmental action.*[80] The term "all" is derived from the plain meaning of the word "any" used in section 1983, because by this language, Congress intended that the statute cover all rights which may exist under the Constitution and federal laws.

Several courts and commentators have argued about the scope of section 1983 rights being a factor in determining whether a particular phrase in the Constitution confers rights within the meaning of this statute.[81] Questioning the scope of section 1983 rights is inconsequential to a determination of what the rights are, because defining the scope of section 1983 rights merely begs the question. As discussed in part A of this section, the language employed in section 1983, "*any* rights," clearly shows that if a right exists, it is within the ambit of section 1983 rights. Basing the definition of rights upon fourteenth amendment considerations in no way subtracts from this scope. Rather, the focus of the fourteenth amendment argument is on this amendment's underlying rights existing as a subset of those rights which are characteristically immune from governmental interference. This definition does not attempt to limit section 1983 rights to those included in the fourteenth amendment, or any other constitutional provision. Indeed, it is illogical to say that fourteenth amendment rights are in-

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80. Professor Choper is in accord with this definition. *See generally* Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977). In his discussion of individual rights versus states' rights, Choper observes that "[t]he essence of the individual rights claim is that no organ of government, national or state, may undertake the challenged activity." *Id.* at 1555. The very reason this is a right is because the right is immune from government interference in the same way as the above definition of rights is described. In contrast to individual rights violations, Choper states that there is the scenario "[w]hen the contention is made that the national government has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern . . . ." *Id.* In this circumstance, it is conceded that either the state or the federal government has the power to act, "the issue is simply whether the particular level that has acted is the constitutionally proper one," not whether some individual right has been violated. *Id.* As will be discussed in section three of this article, this distinction is crucial in determining whether the Commerce Clause confers individual rights, because a right cannot exist in an area where one of the governmental actors has the power to act at the exclusion of the others.

81. *See, e.g.*, Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Thompson v. New York, 487 F. Supp 212 (N.D.N.Y. 1979); Poirier v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978); Note, *Dormant Commerce Clause Claims*, *supra* note 1, at 184; Comment, *The Commerce Clause*, *supra* note 1, at 764.

cluded in section 1983, but that other rights under the Constitution and laws are not, in the face of the absolute use of the term "any" to modify "rights."

Section 1983's legislative history reveals that the rights Congress intended to protect were those that "inured" to the individual, for example, under the fourteenth amendment. Finally, the natural law concept, upon which the fourteenth amendment and section 1983 were based, dictates that these "things" are rights because they define the limits of government power. The next section considers whether a right exists under the Commerce Clause in light of this definition of the term "rights."

III. The Relationship Between Rights and the Commerce Clause

Section one of this comment noted that in its *Consolidated Freightways Corp. v. Kassel* decision, the Eighth Circuit avoided defining a right before concluding that the Commerce Clause does not secure any rights.[82] The court reasoned that the Commerce Clause served only to alter the power structure between the state and federal governments, not to secure section 1983 rights.[83] Though the court cited in detail many authorities to support its proposition, it failed to explain why the Commerce Clause served only to allocate power.[84] In fact, the allocation hypothesis is based on the idea that commerce is subject to regulation by both the state and federal governments. The Supreme Court has recognized this principle since the time of *Gibbons v. Ogden*[85] and *Cooley v. Board of Wardens*.[86] The Commerce Clause

82. 730 F.2d at 1144.

83. *Id.*

84. The same issue has been discussed in the context of the Supremacy Clause of the Constitution, which has also been deemed a power allocation provision. *See* Note, *Section 1983 Remedies*, *supra* note 1 (discussing the Ninth Circuit's decision in White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987)); *cf.* Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 449 (1989) (stating, "the Supremacy Clause, of its own force, does not create rights enforceable under [section] 1983 . . .").

85. 22 U.S. (9 Wheat.) at 196 (Congress' power to regulate under the Commerce Clause, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution.").

86. 53 U.S. (12 How.) 299 (1851). *Cooley* established the dormant commerce clause doctrine which relies on the principle that "if the item [to be regulated] is such

acts to shift the power of commercial regulation between the state and federal governments. Where Congress has passed regulatory legislation pursuant to its Commerce Clause power, the states are precluded from occupying the field with their own statutes.[87] Where Congress has not acted to regulate commerce in a particular area, the states may be allowed to do so under the dormant commerce clause doctrine.[88] The Commerce Clause thus serves to allocate power between Congress and the States because in any given context, commerce between the states is subject to regulatory power, and the Commerce Clause determines which entity may exercise this power. The final question is whether a right cognizable under section 1983 exists within this structure of the Commerce Clause. This inquiry reveals that the bifurcated nature of a right, that which inures to the individual *and* must be free from government interference for its existence, precludes the existence of a right under the Commerce Clause.

A. Does the Commerce Clause Inure to the Individual?

The first step in determining whether the Commerce Clause secures an individual right for 42 U.S.C. § 1983 purposes is to discover whether the Commerce Clause provides for something which inures to the individual. This inquiry reveals a possible problem with the allocation of power hypothesis. At least one commentator has asserted that if the Commerce Clause serves only to allocate power with disregard to the individual who is affected, then this individual should not have standing to bring an action seeking invalidation of a state statute which violates the Commerce Clause,[89] when in actuality he does.[90] The argument continues that because individuals do have standing to bring

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that national uniformity is necessitated, then [c]ongressional power is exclusive[, but if] the item is representative of a peculiarly local concern (even though within the reach of the [c]ongressional [C]ommerce [C]lause power . . .) warranting a diversity of treatment, then concurrent state regulation is authorized in the absence of congressional preemption." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 4, § 8.4, at 266.

87. This was the issue presented in *Gibbons* where New York's licensing law was in direct conflict with that enacted by Congress pursuant to the Commerce Clause. 53 U.S. (12 How.) 299 (1851). Because the statute was within Congress' Commerce Clause power, the Supremacy Clause acted to invalidate the conflicting state statute. L. TRIBE, *supra* note 61, § 5-4, at 306.

88. L. TRIBE, *supra* note 61, §5-4, at 306.

89. Note, *Dormant Commerce Clause Claims*, *supra* note 1, at 167-69.

90. *See* J. CHOPER, *supra* note 62, at 209.

Commerce Clause challenges, an implied right exists under this Clause, which is within the meaning of section 1983 rights. The Commerce Clause is thus seen to "inure or work for" the use of the individual, and, therefore, to confer an individual right. However, this conclusion is not required by the standing doctrine. Further analysis reveals that even though the Commerce Clause inures to the individual in some respects, it does not provide for individual rights due to its power allocating nature.

Though the Commerce Clause serves to allocate power between the state and federal governments, this is not to say that individuals are not affected by the Commerce Clause. The individual can, and usually does, have standing in federal courts to challenge a statute that burdens interstate commerce.[91] The reason lies in the elements of standing which the Supreme Court has developed based on Article III of the Constitution: namely, personal stake, injury-in-fact, causation, and redressability.[92] Based only on the Commerce Clause as an allocation provision between the state and federal governments, these elements are easily satisfied using *Dennis v. State*[93] as an example.

The Nebraska tax statutes applied to tractor-trailer rigs registered in states other than Nebraska.[94] On this basis, the statutes were declared unconstitutional under the Commerce Clause.[95] Dennis' tractor was within this class affected by the unconstitutional statutes,[96] therefore, he had a personal stake in the outcome of the case. Enforcement of the unconstitutional tax statutes directly caused Dennis to be deprived of his money.[97] This satisfies the injury-in-fact requirement. Dennis' injury is individuated in that the statutes impacted directly on the tractor he owned, as well as those similarly situated.[98] Finally, the judicial remedy, in this case an injunction barring enforcement of the statutes, served to alleviate the harm caused by the statutes.[99]

Since the elements of the standing doctrine are satisfied, Dennis

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91. *Id.*

92. The Article III "case or controversy" requirement derives from U.S. CONST. art. III, § 2, cl. 1. *See* L. TRIBE, *supra* note 61, § 3-14, at 108.

93. 234 Neb. 427, 451 N.W.2d 676 (1990).

94. *See supra* note 11 and accompanying text for a discussion of the statutes that were in issue.

95. *Dennis*, 234 Neb. at 428, 451 N.W.2d at 678.

96. *Id.* at 442, 451 N.W.2d at 685.

97. *Id.*

98. *Id.*

99. *Id.* at 428, 451 N.W.2d at 678.

would have standing to bring the case into federal court. But at no point in this analysis is it necessary, or even helpful, to say that an individual right must exist under the Commerce Clause in order for the individual to have standing in the federal courts. However, it is apparent that Dennis is somehow affected by the Clause's operation in this case, and that this operation inures to him as an individual, because applying the Clause to invalidate the Nebraska statutes is a direct benefit to Dennis who no longer has to pay the taxes while driving in the state. Thus, it is possible to satisfy the "inures to the individual" part of the definition of "rights" related in section two.

A Commerce Clause plaintiff must also satisfy the Court's prudential standing requirements.[100] As the Supreme Court stated, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no *individual rights* would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[101] Use of the term "individual rights" would seem to imply that if the Court recognizes the plaintiff's standing to sue, it must also, impliedly, recognize that the plaintiff is vindicating a right. Further, because the Supreme Court has allowed plaintiffs to sue based on state violations of the Commerce Clause, this arguably implies that the plaintiffs are vindicating an individual right under this Clause. However, this conclusion does not follow from a consideration of the Court's prudential standing elements.

Three "prudential principles" exist which can bar a litigant from suing in federal court.[102] The Commerce Clause litigant easily meets all three of these requirements without the hypothesized implication of

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100. *See* Note, *Dormant Commerce Clause Claims*, *supra* note 1, at 168-69.

101. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) (emphasis added). *See also* Warth v. Seldin, 422 U.S. 490 (1975) (distinguishing between, and describing, the Article III case or controversy and prudential standing requirements).

102. These principles are: "plaintiff's interest must come within the 'zone of interests' arguably protected or regulated by the law in question, [Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970);] . . . the courts will not hear 'generalized grievances' shared in substantially equal measure by all or a large class of citizens, [United States v. Richardson, 418 U.S. 166 (1974);] . . . [and] plaintiff must assert his own legal interests rather than those of third parties, [Tileston v. Ullman, 318 U.S. 44 (1943)]." C. WRIGHT, LAW OF THE FEDERAL COURTS § 13, at 70-71 (4th ed. 1983). *See also* L. TRIBE, *supra* note 61, § 3-14, at 108 (discussing the Court's prudential standing requirements).

an individual right under the Commerce Clause. This is evident by again using *Dennis v. State*[103] as an example.

First, Dennis was in the "zone of interests" regulated by the Nebraska tax statutes, because he was within the class of people who had to pay road-use taxes pursuant to the statutory scheme.[104] The second tier of the prudential standing limitations is satisfied, because Dennis' complaint is more than a generalized grievance shared by citizens at large. Rather, Dennis sustained *injury-in-fact* by having to pay one to two cents per mile of highway driven in Nebraska due to this state's error in enacting the tax statutes.[105] Finally, though Dennis can be seen to have asserted Congress' interests under the Commerce Clause in protecting interstate commerce from burdensome state statutes by seeking to enjoin their enforcement, Dennis was also asserting his *own* interests in alleviating the injury caused *him* by the unconstitutional Nebraska tax statutes. Thus, even though assertion of Congress' "rights" helped Dennis in his case against Nebraska, the point of Dennis' complaint was not vindication of Congress' interests, but vindication of his own injury, lost money, caused by the Nebraska statutes. With this, Dennis' complaint satisfies the Court's prudential standing elements without invoking an individual right under the Commerce Clause.

As this example demonstrates, satisfaction of the Supreme Court's prudential standing requirements is not predicated on the plaintiff's assertion of an individual right under the Commerce Clause. The simple fact that the plaintiff had to, for instance, pay money when he was not legally obliged to do so is sufficient to satisfy these standing requirements. The prudential standing limitations do not necessitate the plaintiff's assertion of his own rights. Rather, the plaintiff need only show sustained injury in order to overcome the prudential standing hurdle. Commerce Clause plaintiffs meet this requirement due to the economic injury, as in the *Dennis* case, caused to them by enforcement of state statutes which violate the Commerce Clause.[106] However, it is apparent

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103. 234 Neb. 427, 451 N.W.2d 676 (1990).

104. *Id.* at 442, 451 N.W.2d at 685.

105. *Id. See also* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 6.3, at 327 (1985) (stating that this element requires a showing of injury-in-fact).

106. Singleton v. Wulff, 428 U.S. 106 (1976), is also a case where the prudential standing limitations were met based on economic injury. The Court allowed the plaintiff doctor to assert the constitutional rights of his patients where enforcement of the state statute against the patients would have caused the doctor injury in the form of lost medical fees. Also, in Craig v. Boren, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S.

here, as with the Article III standing analysis above, that the Commerce Clause does provide some protection which inures to the individual. For the Clause to confer an individual right, though, it must also protect the individual from government action at both the state and federal levels.

B. Does the Commerce Clause Enable the Individual to be Free from Government Interference?

The Commerce Clause falls short as a provision for rights due to its failure to provide something that could be called a right upon which a person could claim to be free of government interference. The district court opinion in *Consolidated Freightways Corp. v. Kassel* explicitly recognized this principle by quoting Professor Choper's work in the field of federalism.[107] The court relied on Choper's statement that " '[t]he essence of a claim . . . which falls into the individual rights category of constitutional issues . . . is that no organ of government, national or state, may undertake the challenged activity' " to distinguish rights from benefits under the Commerce Clause.[108] The court quoted further from Choper: " 'In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has power to engage in the questioned conduct,' " and stated that "[t]he dormant [c]ommerce [c]lause doctrine is clearly a 'federalism' provision within Prof[essor] Choper's framework, because a dormant [c]ommerce [c]lause action does not deny government power altogether . . . ."[109]

The district court's reasoning in *Consolidated Freightways Corp.* relied on the notion that the Commerce Clause is a power allocating provision of the Constitution, as evidenced by the court's recognition that commerce is subject to regulation, and that it is just a matter of which "level" of government can regulate within the Commerce Clause

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1124 (1977), the Court found standing with a dealer of 3.2% beer who asserted the equal protection rights of males under an Oklahoma drinking age statute which injured the dealer due to the lost profits of sales to the restricted males.

107. 556 F. Supp. 740, 746 (1983), *aff'd*, 730 F.2d 1139 (1984). In affirming the district court's reasoning, the court of appeals noted that the district court opinion was "well reasoned." *Consolidated Freightways Corp.*, 730 F.2d at 1143.

108. *Consolidated Freightways Corp.*, 556 F. Supp. at 746 (quoting J. CHOPER, *supra* note 62, at 175).

109. *Id.*

limitations. As this comment's definition of rights states, in order for a right to exist, the individual who claims its existence must also be able to claim that the right is free from government interference or revocation. As the court concludes in *Consolidated Freightways Corp.*, based in part on Choper's reasoning, because the Commerce Clause always admits to at least one government entity with power over commerce, the concomitant presence of a right is precluded due to the nature of that right's existence, requiring freedom from government power at *all* levels.[110]

However, the question arises that if the Commerce Clause does not secure rights, then how is the individual affected by the operation of this clause? The answer was succinctly given by the Eighth Circuit in *Consolidated Freightways Corp.*: "[I]ndividuals are oftentimes benefitted through the indirect protection resulting from the limitations placed on the states through the dormant [c]ommerce [c]lause doctrine . . . ."[111] The court's statement is true in the sense that what individuals derive from the Commerce Clause can be taken away at an instant. This is the nature of a benefit as the word is used by the above court. No matter what it is called, the effect of the Commerce Clause on the individual is not a right, because the effect, whether beneficial or not, can be legislated away by the state or federal government at any time. The distinction, therefore, between a right and a benefit is that a right exists of its own force and is not subject to government action abridging its exercise by the individual. A benefit, on the other hand, exists according to some governmental provision which can be taken away at any time. This distinction is clear in *Champion v. Ames*[112] where the Court upheld federal legislation, enacted pursuant to Congress' Commerce Clause power, which forbade the interstate transport of lottery tickets. If there is an individual right to engage in the interstate commerce of lottery tickets, or to be free of state statutes which forbid such commerce, how is it that Congress can eradicate this right? By nature, a right is something that cannot be taken away by government, such as the right to free speech under the first amendment, or the right to be free of warrantless searches and seizures under the fourth amendment.[113] Therefore, Congress, as well as the states, should not be able to take away the "right" to engage in interstate transport of lottery

110. *Id.* at 748.
111. *Consolidated Freightways Corp.*, 730 F.2d at 1145.
112. 188 U.S. 321 (1903).
113. *See supra* section two of this comment.

tickets, or to be free of state statutes which do this, under the Commerce Clause if it confers a right. The answer to the question lies in the fact that it is based on an improper premise that a right exists under the Commerce Clause.

Before the congressional legislation banning transport of lottery tickets, the individual could claim the benefit, under the Commerce Clause's allocation of power to Congress, of being free to transport lottery tickets in interstate commerce. This is not a right though, because Congress could act at any time, as it did, to forbid the transport.[114] The individual also does not have the right to be free of state statutes which forbid this commerce because either Congress could act to allow the states to do this, or the Court may determine that the state was pursuing a permissible governmental interest in forbidding the transport.[115] Either way, the freedom to engage in interstate commerce is subject to termination by a government entity, termination which is not compatible with the existence of a right but which is compatible with the existence of a benefit. This distinction made between rights and benefits under the Commerce Clause by the court in *Consolidated Freightways Corp.* is viable, and is supported by the Nebraska Supreme Court's decision in *Dennis v. State* and the cases cited therein.[116]

IV. Cases in Support of the Commerce Clause as an Allocation Provision

The Nebraska Supreme Court in *Dennis v. State*, relied on the majority of cases speaking to the "rights" issue which held that the Commerce Clause, as a power allocation provision of the Constitution, did not include individual rights as the term is used in 42 U.S.C. § 1983.[117] The foremost authority in this area is the court of appeals opinion in *Consolidated Freightways Corp. v. Kassel*, based on the number of courts which have adopted the Eighth Circuit's reasoning in this case. These courts concluded, as the Nebraska Supreme Court and the Eighth Circuit did, that the nature of the Commerce Clause as a

114. *Champion*, 188 U.S. at 325.

115. Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

116. 234 Neb. 427, 451 N.W.2d 676.

117. *Id* at 427, 451 N.W.2d at 676. It was stated in Private Truck Council of America v. Quinn, that "the weight of authority" supports the prior decisions that violation of the Commerce Clause "is not cognizable in an action under 42 U.S.C. § 1983." 476 U.S. 1129 (1986) (White, J., dissenting) (Justices Brennan and O'Connor joined in this dissent.).

power allocation provision of the Constitution precludes the existence of an individual right for the purposes of a section 1983 claim of relief.

One of the cases which adopted the *Consolidated Freightways Corp.* reasoning was *Kraft v. Jacka*[118] which involved "a section 1983 action against members of the Nevada Gaming Control Board after the board refused to extend further licensing to the plaintiffs when their 1-year limited gaming licenses expired."[119] The plaintiffs argued that their Commerce Clause "rights" had been violated when the Gaming Board issued a stop order on the sale of out-of-state securities in which plaintiffs had an interest.[120] Relying in part on the *Consolidated Freightways Corp.* decision, the Ninth Circuit stated, "assuming that the Board's actions in any way implicated the Commerce Clause, the plaintiffs cannot state a cause of action under [section] 1983 for violation of the Clause" because the Clause was an allocation of power provision which the section 1983 remedy was not intended to cover.[121] Thus, the court relied on the allocation of power concept to deny the existence of a right under the Commerce Clause.

Another case which relied on the *Consolidated Freightways Corp.* allocation of power concept was *Pesticide Public Policy Foundation v. Village of Wauconda*,[122] involving a Village ordinance which regulated the use of pesticides within its jurisdiction. Among other claims, the Foundation asserted that the ordinance violated the Commerce Clause, and sought attorney's fees for its members pursuant to a section 1983 claim.[123] In dictum, after the court decided that the Foundation did not have standing to sue on behalf of its members for fees, the court stated that the "Commerce Clause relates not to individual rights, but rather to the distribution of power between the state and federal govern-

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118. 872 F.2d 862 (9th Cir. 1989).

119. *Dennis*, 234 Neb. at 433, 451 N.W.2d at 680.

120. *Kraft*, 872 F.2d at 869.

121. *Id.* The court also relied on its own decision in White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1984), *cert. denied*, 479 U.S. 1060 (1987). That case involved an Arizona taxing scheme which the plaintiff Tribe alleged conflicted with federal regulations, and was, therefore, in violation of the Supremacy Clause. *Id.* at 846. The plaintiff succeeded in overcoming the state statute but failed in its attempt to secure attorney's fees under section 1988 for a violation of Supremacy Clause rights. *Id.* at 850. The Ninth Circuit viewed the Supremacy Clause as a provision, like the Commerce Clause, which allocates power between the state and federal governments. *Id.* at 849. *See also* Note, *Section 1983 Remedies*, *supra* note 1.

122. 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd*, 826 F.2d 1068 (7th Cir. 1987).

123. *Id.* at 426.

ments" and on this basis, concluded that section 1983 does not support violations of the Commerce Clause.[124] With this, the court accepted the allocation of powers concept and held that attorney's fees could not be awarded for a Commerce Clause violation.

The Tenth Circuit, in *J & J Anderson v. Town of Erie*,[125] also denied section 1988 attorney's fees for Commerce Clause violations based on the allocation of power concept. The Town of Erie passed an ordinance which prohibited certain airplanes from landing within its borders.[126] The ordinance was later repealed, but the plaintiff sought attorney's fees for the violation of, among other things, his rights under the Commerce Clause.[127] The court concluded that "[t]he Commerce Clause . . ., although limiting the power of the states to interfere in areas of national concern, [does] not secure rights cognizable under [section] 1983," and denied the plaintiff's claim for attorney's fees under section 1988.[128] With this, the Tenth Circuit also fell in line with those cases stating that the Commerce Clause, as a constitutional provision which serves to allocate power between the levels of government, does not confer section 1983 rights.[129]

Several federal courts would expressly allow the Commerce Clause

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124. *Id.* at 435-36. The *Pesticide* court also relied on the Seventh Circuit holding in Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984), which in turn relied on the *Consolidated Freightways Corp.*, 730 F.2d 1139, allocation of power analysis, that the Supremacy Clause does not secure rights within the meaning of section 1983. *Pesticide Pub. Policy Found.*, 622 F. Supp. at 435.

125. 767 F.2d 1469 (10th Cir. 1985).

126. *Id.* at 1471.

127. *Id.* at 1472.

128. *Id.* at 1476.

129. Several state cases also denied section 1988 attorney's fees for Commerce Clause violations, based on the allocation of powers reasoning in *Consolidated Freightways Corp.*, 730 F.2d 1139. *See, e.g.*, State v. Private Truck Council, Inc., 258 Ga. 531, 371 S.E.2d 378 (1988) (Georgia highway-user tax statutes violating the Commerce Clause did not implicate section 1983 rights); Private Truck Council, Inc. v. State, 221 N.J. Super. 89, 534 A.2d 13 (1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988) (retaliatory New Jersey tax on out-of-state truckers violating the Commerce Clause does not violate any section 1983 rights); Private Truck Council, Inc. v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986) (reciprocal Maine taxes on out-of-state truckers which violated the Commerce Clause did not implicate rights under section 1983); Private Truck Council, Inc. v. State, 128 N.H. 466, 517 A.2d 1150 (1986) (relying on *Private Truck Council, Inc.*, 503 A.2d 214, to state that section 1983 rights are not involved with state statutes that burden interstate commerce by taxing trucks registered in other states).

cause of action under section 1983 in opposition to the authorities above. One of these is *Confederated Salish and Kootenai Tribes v. Moe*.[130] In an action seeking to enjoin enforcement of a Montana tax of cigarette sales by the plaintiff tribes, an issue was raised by the defendant that the court lacked subject matter jurisdiction pursuant to 28 U.S.C. § 1341 which prohibits, among other things, enjoining state taxation where an efficient remedy can be had in the state's courts.[131] In the court's conclusion that 28 U.S.C. § 1362 granted subject matter jurisdiction over the tribes' claims, the court also stated that it had jurisdiction over the individual plaintiffs' claims under the jurisdictional counterpart to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), because these plaintiffs had alleged violations of the Commerce Clause which secured rights cognizable under 42 U.S.C. § 1983.[132] The basis for the court's conclusion was a prior statement made by the Supreme Court in *Lynch v. Household Finance Corp.* that the section 1983 phrase " 'rights, privileges, or immunities secured by the Constitution and laws includes not only [f]ourteenth [a]mendment rights, but '[*all* of] the Constitution [and] laws of the United States.' "[133] The district court's reliance on *Lynch* was improper, and did not serve to prove that section 1983 rights exist under the Commerce Clause.

The *Lynch* Court's dictum was not stated pursuant to a determination under the Commerce Clause. Instead, the case dealt with whether there was a viable distinction between personal and property rights for purposes of a section 1983 claim of relief under the fourteenth amendment.[134] Also, and perhaps more importantly, the Court's statement only revealed the intent to apply section 1983 to rights which existed beyond the fourteenth amendment context and did so without defining these rights.[135] Thus, the *Kootenai* conclusion, based on the Supreme Court's decision in *Lynch* does not support a conclusion that individual rights exist under the Commerce Clause.

Furthermore, the Supreme Court, in affirming the decision in *Kootenai*, made statements which also discredit the district court's decision

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130. 392 F. Supp. 1297 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 (1976).

131. *Id.* at 1301-02.

132. *Id.* at 1304.

133. *Id.* at 1305 (emphasis in original) (quoting Lynch v. Household Finance Corp., 405 U.S. 538, 549 n.16 (1972)).

134. *Lynch*, 405 U.S. at 542.

135. *Id.* at 556.

that the Commerce Clause conferred section 1983 rights.[138] First, the Court decided the case based only on the tribes' claims.[137] The Court went on to say in a footnote that "if only the individual Indians have standing to sue for refunds, their claims must be properly grounded jurisdictionally."[138] This statement called into question the district court's belief that the individual plaintiffs' Commerce Clause claims implicated rights which provided jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Although not dispositive, the Court's dictum suggests that the district court acted improperly in predicating jurisdiction on an alleged Commerce Clause rights violation.[139]

The court in *Kennecott Corp. v. Smith* would also allow the section 1983 claim of relief under the Commerce Clause.[140] The court considered whether to invalidate a New Jersey statute which the plaintiff alleged was in conflict with the Securities Exchange Act of 1934.[141] In determining whether the federal anti-injunction statute, 28 U.S.C. § 2283, barred plaintiff's request for an injunction, the court stated that "actions brought under [section] 1983, such as this case, are explicit exceptions to the anti-injunction act."[142] In a footnote, the court supported this statement by saying that "[t]he present action is properly brought under section 1983 because it seeks redress for deprivations of constitutional rights secured by the Commerce Clause and of federal statutory rights protected by the [Securities Exchange Act,]"[143] and cited *Maine v. Thiboutot* as authority.[144]

Two problems exist with relying on *Thiboutot* for the proposition that the Commerce Clause secures section 1983 rights. The first is that

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136. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1975).

137. *Id.* at 474-75, 475 n.14.

138. *Id.* at 468 n.7.

139. *Id*; *see also* Connor v. Rivers, 25 F. Supp. 937, 938 (N.D. Ga. 1938) (stating that a Georgia statute violating the Commerce Clause did not affect any rights for jurisdictional purposes under § 1343(3) (then codified at 28 U.S.C. § 41(14)), *aff'd mem.*, 305 U.S. 576 (1939).

140. 637 F.2d 181 (3d Cir. 1980).

141. *Id.* at 183.

142. *Id.* at 186.

143. *Id.* at 186 n.5. *See also* Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (relying solely on *Thiboutot*, 448 U.S. 1, to allow a section 1983 action under the Commerce Clause); ANR Pipeline Co. v. Michigan Pub. Serv. Comm'n, 608 F. Supp. 43 (W.D. Mich. 1984) (similarly relying on *Thiboutot*, 448 U.S. 1, and, in turn, *Kennecott Corp.*, 637 F.2d 181, to allow the section 1983 action under the Commerce Clause).

144. 448 U.S. 1 (1980)

the *Kennecott Corp.* court provided absolutely no reasoning for its conclusion, which is relegated to a footnote.[145] Second, the *Thiboutot* case relied upon by the court does not stand for the proposition that the Commerce Clause confers individual rights. Rather, the *Thiboutot* Court held that section 1983 provided a remedy for all violations of *federal statutes* which create individual rights.[146] The court in *Kennecott* relied on the Supreme Court's statement that "the section 1983 remedy broadly encompasses violations of federal statutory *as well as constitutional law.*"[147] Either way, the reliance on *Thiboutot* was misplaced, because that case did not address whether rights existed under the Commerce Clause.[148]

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145. *Kennecott*, 637 F.2d at 186 n.5.

146. 448 U.S. at 4.

147. *Id.* (emphasis added).

148. *Consolidated Freightways Corp.*, 730 F.2d at 1143. Several Supreme Court cases also seem to contradict the conclusion that the Commerce Clause supports no individual rights due to language asserting that individuals have a right to engage in interstate commerce. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 260 (1911); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 21 (1910); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). All except one of these decisions, Garrity v. New Jersey, were handed down during the time that the freedom of contract concept was still in existence, and even *Garrity* expressly relied on *Western Union* for its decision. *Garrity*, 385 U.S. at 500. As stated in section two of this comment, the *Lochner* era relied on the natural law inherent rights of citizens to limit government action. The Court's statements that an individual right to engage in interstate commerce existed would seem to further the natural law's application to limit state infringement on commerce between the states. In any case, the Court's recognition of this right is strictly limited to the theories of that time period which have since been abrogated by the Court. *See also* L. TRIBE, *supra* note 61, §§ 8-5 to 8-6 (generally describing the reasons for the downfall of *Lochnerism*). Abandonment of these theories "restricted the ability of the Justices to rely upon a natural law or openly subjective basis for defining liberty and individual constitutional rights." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 4, § 11.7, at 367. Since the Court's abrogation of the theories which supported the *Lochner* era cases, the Court was no longer in a position to declare that a right to engage in interstate commerce existed, because the foundation for such a statement had been wiped away. This is evident because the Court has never since mentioned a right to engage in interstate commerce. This lack of authority is what provided the impetus for the *de novo* determination of whether a right existed under the Commerce Clause in cases such as *Consolidated Freightways Corp.*, 730 F.2d 1139, and Dennis v. State, 234 Neb. 427, 451 N.W.2d 676, and law review articles like Note, *Dormant Commerce Clause Claims*, *supra* note 1. It is also evident due to the Supreme Court's grant of certiorari to *Dennis* in order to finally resolve the issue of Commerce Clause rights under 42 U.S.C. § 1983. Dennis v. Higgins, 110 S. Ct 2559 (1990).

In light of the predominant body of case law, the Nebraska Supreme Court understandably denied the plaintiff's claim under section 1983 for violation of alleged Commerce Clause rights.[149] The majority of courts which have considered this issue relied on the power allocating nature of the Commerce Clause to conclude that the Clause does not provide for individual rights, which would allow a claim for attorney's fees under section 1988 based on a section 1983 right. The only problem with the reasoning of these authorities is their failure to adequately consider why the Commerce Clause serves only to allocate power between the different levels of government, and to define the term "rights" before concluding that the power allocating nature of the Commerce Clause precludes the existence of rights under this Clause.[150] However, by carefully defining 42 U.S.C. § 1983's use of rights,[151] and closely examining the relationship of the Commerce Clause with the federal and state governments, and within history,[152] the above discussion shows that the reasoning employed by the Nebraska Supreme Court in *Dennis v. State*, as well as those cases which serve to support *Dennis*, was well founded.[153]

Conclusion

As evidenced by the grant of certiorari in the Nebraska case of *Dennis v. State*, the Supreme Court is concerned with the issue of whether the Commerce Clause protects individual rights cognizable under 42 U.S.C. § 1983 which can be used to base an award of attorney's fees under 42 U.S.C. § 1988. By examining the plain meaning and legislative history of section 1983, it is possible to develop a concrete definition of a right, a definition which reveals that its existence requires freedom from government action. When this definition is intertwined with a consideration of the purposes which give life to the Commerce Clause, the result is that the power allocating nature of this constitutional clause, necessary for the commercial security of a country

149. *Dennis*, 234 Neb. 427, 451 N.W.2d 676.

150. *See supra* note 8 and accompanying text, which references other articles that have recognized this flaw.

151. *See supra* section two of this article, stating that a right is anything which inures to the person upon which that person can claim to be free of government action.

152. *See supra* section three of this article, describing the nature of the Commerce Clause as a constitutional provision which serves to allocate power between the state and federal governments.

153. 234 Neb. 427, 451 N.W.2d 676.

comprised of fifty sovereign states, precludes the concurrent existence of an individual right. Thus, the majority of courts which have considered the Commerce Clause issue and which have concluded that the Commerce Clause does not secure rights within the meaning of 42 U.S.C. § 1983 to allow an award of attorney's fees under 42 U.S.C. § 1988 are correct in their decisions.

Holiday Hunt Russell